



# No

## Citation

Adrian Vermeule, No, Texas L. Rev. (forthcoming 2014) (reviewing Philip Hamburger's "Is Administrative Law Unlawful?" (2014)).

## Permanent link

<http://nrs.harvard.edu/urn-3:HUL.InstRepos:12758466>

## Terms of Use

This article was downloaded from Harvard University's DASH repository, and is made available under the terms and conditions applicable to Open Access Policy Articles, as set forth at <http://nrs.harvard.edu/urn-3:HUL.InstRepos:dash.current.terms-of-use#OAP>

# Share Your Story

The Harvard community has made this article openly available.  
Please share how this access benefits you. [Submit a story](#).

[Accessibility](#)

# No

Review of Philip Hamburger, Is Administrative Law Unlawful? (2014)

Forthcoming, Texas Law Review

Adrian Vermeule\*

Philip Hamburger has had a vision, a dark vision of lawless and unchecked power.<sup>1</sup> He wants us to see that American administrative law is “unlawful” root-and-branch, indeed that it is tyrannous -- that we have recreated, in another guise, the world of executive “prerogative” that would have obtained if James II had prevailed, and the Glorious Revolution never occurred. Administrative agencies, crouched around the President’s throne, enjoy extralegal or supralegal power;<sup>2</sup> the Environmental Protection Agency, with its administrative rulemaking and combined legislative, executive and judicial functions, is a modern Star Chamber;<sup>3</sup> Chevron is a craven form of judicially-licensed executive tyranny,<sup>4</sup> a descendant of the Bloody Assizes. The administrative state stands outside, and above, the law.

But before criticism, there must first come understanding. There is too much in this book about Charles I and Chief Justice Coke, about the High Commission and the dispensing power. There is not enough about the Administrative Procedure Act, about administrative law judges, about the statutes, cases and arguments that rank beginners in the subject are expected to learn and know. The book makes crippling mistakes

---

\* John H. Watson Professor of Law, Harvard Law School. Thanks to Ron Levin, Eric Posner and Cass Sunstein for helpful comments, and Chris Hampson for excellent research assistance.

<sup>1</sup> PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014).

<sup>2</sup> See *id.* at 31 (“Just as English monarchs once claimed a prerogative power to make law outside acts of Parliament, so too the American executive now claims an administrative power to make law outside acts of Congress.”); *id.* at 51 (“These days, administrative agencies have revived the imposition of extralegal interpretation, regulation, and taxing.”).

<sup>3</sup> The book is studded with sentences like these: “Although the Star Chamber’s issuance of regulations came to an end with the court itself, administrative regulations have come back to life. Not merely one administrative body, but dozens now issue regulations that constrain the public.” *Id.* at 57.

<sup>4</sup> See *id.* at 316 (“[T]he deference to interpretation is an abandonment of judicial office . . . . [T]hey thereby deliberately deny the benefit of judicial power to private parties and abandon the central feature of their office as judges.”)

about the administrative law of the United States; it misunderstands what that body of law actually holds and how it actually works. As a result the legal critique, launched by five-hundred-odd pages of text, falls well wide of the target.

In the first section, I'll try to reconstruct Hamburger's critique, whose basic ambiguity arises from the fact that Hamburger is impenetrably obscure about what he means by "lawful" and "unlawful." Those terms are only loosely related to the ordinary lawyers' sense. In my view, the best reconstruction is that Hamburger thinks that there are deep unwritten principles of Anglo-American constitutional order, derived from the views of English common-law judges; departures from those principles are "unlawful." In the second section, I'll try to show that the book's arguments are premised on simple, material and fatal misunderstandings of what is being criticized, and never do engage the common and central arguments offered in defense of the administrative state. In the conclusion, I'll consider a suggestion<sup>5</sup> that the book is only masquerading as legal theory, and should instead be understood as a different genre altogether -- something like dystopian constitutional fiction. Although the suggestion is illuminating, and tempting, I don't think it applies here.

## I. Reconstruction

Let me very briefly summarize the surface content of the book (I.A.), and then try to reconstruct what Hamburger means when he calls administrative law "unlawful" (I.B.).

### A. On the Surface

The book's *modus operandi*, which gives it a visionary atmosphere, is its relentless raising of the stakes about the administrative state and administrative law. If Hamburger is correct, it's not just that this or that decision is wrong, or that the "nondelegation doctrine" should be revived, or that the combination of functions in agencies should receive renewed judicial scrutiny. The usual debates of constitutional lawyers are small-bore, fiddling around the edges of the problem -- a far greater and

---

<sup>5</sup> Offered by my colleague Charles Fried, at a conference on the book manuscript at Columbia Law School.

darker problem.<sup>6</sup> If Hamburger is correct, the administrative state is a political abomination, an engine of tyranny. “At stake is nothing less than liberty under law.”<sup>7</sup>

Modern administrative law is a soft form of “absolutism,” Hamburger tells us over and over again.<sup>8</sup> Indeed it is a specifically continental absolutism, a betrayal of the Anglo-American rule of law and legal liberty that was rooted in the constitutionalism of the common-law judges developed in the 16th and 17th centuries. In passages reminiscent of Albert Venn Dicey’s alarmism over *droit administratif*,<sup>9</sup> Hamburger traces the origins of administrative law to both French<sup>10</sup> and German<sup>11</sup> legal theory, most importantly Prussian *Ordnung* or bureaucratic ordering of an absolutist cast.<sup>12</sup> Administrative law represents the “Prussification” of our society.<sup>13</sup>

In England, absolutism was the road not taken, the path urged by civilian lawyers, influenced by Roman imperial law.<sup>14</sup> On that path lay “prerogative” -- not merely the “ordinary” prerogative within the common law, namely the various royal powers themselves recognized by common-law judges, but instead a far more sweeping “extraordinary” prerogative outside and above the law. The heroes of the resistance to the imperial prerogative, the Jedi Knights of the story, are first and foremost the English common-law judges.<sup>15</sup> Hamburger also credits the statesmen who

---

<sup>6</sup> According to Hamburger, “[t]he dark possibilities for America were evident already in the nineteenth century.” HAMBURGER, *supra* note 1, at 450.

<sup>7</sup> *Id.* at 496. Other dangers of administrative law, according to Hamburger, are the risk of “overwhelm[ing] the Constitution,” *id.* at 493, “evad[ing] a wide range of regular law, adjudication, institutions, processes, and rights,” *id.* at 494, giving rein to the “lust for power outside the law,” *id.* at 495, generating feelings of alienation from government, *id.* at 498, and allowing the “knowledge class” to “enlarge[] its own power,” *id.* at 503. Most ominously, Hamburger writes that “the longer this coercion persists, the more one must fear that the remedy also will be forceful.” *Id.* at 489.

<sup>8</sup> *E.g.*, HAMBURGER, *supra* note 1, at 6–7; *id.* at 25–26; *id.* at 409–17 (discussing the “serious charge” of claiming that “administrative law is a form of absolute power”); *id.* at 508 (“Although it would be an exaggeration to denounce administrative power as mere tyranny or despotism, this power is profoundly worrisome. Even soft absolutism or despotism is dangerous.”).

<sup>9</sup> See, e.g., A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 370–71 (10th ed. 1961) (comparing *droit administratif* to the tyranny of Star Chamber).

<sup>10</sup> See HAMBURGER, *supra* note 1, at 444 (discussing Jean Bodin).

<sup>11</sup> See *id.* at 447–50 (discussing von Treitschke, von Jhering, Lorenz von Stein, Rudolph von Gneist, and especially Hegel).

<sup>12</sup> See *id.* at 445–47.

<sup>13</sup> *Id.* at 505.

<sup>14</sup> See *id.* at 34 (“[T]he English self-consciously rejected civilian jurisprudence . . . [which] became a vehicle for justifying absolute power.”); *id.* at 443 (arguing the source of absolute power was an academic focus on “Roman-derived canon and civil law” which “threatened English law,” but was checked, *inter alia*, by King Stephen, who “declared Roman law should have no place or at least no authority in England”).

<sup>15</sup> See *id.* at 45–47 (describing how *The Case of Proclamations* came before the judges).

opposed James II, invited the invasion of a foreign king, William III, and brought about the Glorious Revolution;<sup>16</sup> but he does not adore them the way he adores Chief Justice Coke.<sup>17</sup>

What has all this to do with us? Our present embodies the very fate the English common-law judges, and the Parliamentary statesmen of 1689, thought they had averted. As of 2014, we have recreated the absolutist rule of imperial prerogative, perhaps in a somewhat softer form (Hamburger equivocates about this<sup>18</sup>) or in a milder disguise, but with essentially the same results.<sup>19</sup> Liberty is at the mercy of extra-legal bureaucratic *Ordnung*, lightly cloaked in various constitutional and legal fictions about delegation and authorization, but substantively the same.<sup>20</sup>

The hallmarks of extralegal absolutism are everywhere to be seen, in the system of administrative law created since the Progressive Era. Agencies engage in “extralegal legislation,” meaning the issuance of binding general rules,<sup>21</sup> and “extralegal adjudication,” meaning the issuance of binding orders.<sup>22</sup> Procedurally, agencies wield combined powers and functions. In contrast to a system of separated powers and specialized functions, their decisions are “unspecialized,”<sup>23</sup> “undivided,”<sup>24</sup> and “unrepresentative,”<sup>25</sup> among other failings. The judges, cravenly, have created an “entire jurisprudence of deference”<sup>26</sup> that provides a sinister twist on the ideal of rule

---

<sup>16</sup> See HAMBURGER, *supra* note 1, at 48.

<sup>17</sup> See *id.* at 46 (“Coke, however, refused to be bullied.”); *id.* at 47 (“[King James’ maneuvering] could only have given greater resolve to Coke and his colleagues. The next month they reported back what the king did not want to hear.”); *id.* at 319 (“James I expected his judges literally to bow before him. But even when Chief Justice Coke had to get down on his knees before his king, he refused to defer. He kept on speaking his mind, exercising his independent judgment. . . . Eventually Coke was dismissed for his temerity, but his common law understanding of judicial office survived . . .”).

<sup>18</sup> Compare *id.* at 493 (calling administrative law a “revival of absolute power,” a “consolidated governmental power outside and above the law,” which “threatens to overwhelm the Constitution”), with *id.* at 508 (suggesting administrative law may more prudently be deemed only “soft absolutism or despotism,” although nonetheless dangerous).

<sup>19</sup> *Id.* at 494 (“[P]rerogative power has crawled back out of its constitutional grave and come back to life in administrative form.”).

<sup>20</sup> *Id.* at 508 (discussing the German system of *Ordnung* and the “familiar dangers” of “the order imposed by an administrative class”).

<sup>21</sup> *Id.* at 31–32.

<sup>22</sup> *Id.* at 129–31.

<sup>23</sup> *Id.* at 325.

<sup>24</sup> *Id.* at 347.

<sup>25</sup> *Id.* at 355.

<sup>26</sup> *Id.* at 319.

“through the law and its courts.”<sup>27</sup> The jurisprudence of deference amounts to “an abandonment of judicial office.”<sup>28</sup>

What then is to be done? In a few cursory final sections, Hamburger offers some brief suggestions, vague and ill-defined. The main one is that judges should engage in an “incremental approach to administrative law,” meaning “step-by-step corrections” that will “bring judicial opinions back into line with the law.”<sup>29</sup> (In a moment, I will suggest that by “law” here, Hamburger necessarily means law in a substantive and unwritten sense - “law” as the deep principles of a common-law Anglo-American constitutional order). The resulting pragmatic problems are dismissed in the most cursory fashion imaginable; Hamburger merely says that “[u]ndoubtedly, in some areas of law, concerns about reliance, the living constitution, precedent, and judicial practicalities can be very serious. It is far from clear, however, that they are substantial enough to justify absolute power . . . .”<sup>30</sup> Hamburger’s interest obviously flags in this section; his passion lies in articulating his dark vision, in the diagnosis of our ills, rather than in prescribing remedies.<sup>31</sup>

## B. “Unlawful”?

What exactly does Hamburger’s title mean? Patently, he must be using the word law in two different senses to say that a body of “law” is “unlawful.” Others have noted that Hamburger never makes clear what exactly he intends<sup>32</sup> -- in a book over six hundred pages long.

Given his historical interests, the most obvious possibility is that Hamburger means to advance an originalist claim: that administrative law is inconsistent with the original understanding of the Constitution of 1789. But this has already been done as well as it can be,<sup>33</sup> and in any event I don’t believe that’s what Hamburger is getting at.<sup>34</sup>

---

<sup>27</sup> *Id.* at 280.

<sup>28</sup> *Id.* at 316.

<sup>29</sup> *Id.* at 491.

<sup>30</sup> *Id.* at 492.

<sup>31</sup> Compare *id.* at 491–92, 509–511 (describing some practical responses), with *id.* at 1–491, 493–509 (describing the problem).

<sup>32</sup> See Gary Lawson, *The Return of the King: The Unsavory Origins of Administrative Law*, TEXAS LAW REVIEW (forthcoming 2014) (manuscript at 7–15), available at <http://www.bu.edu/law/faculty/scholarship/workingpapers/2014.html>.

<sup>33</sup> See Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

If Hamburger were an originalist in the conventional American sense, he would spend far more time on the ordinary meaning of the text as of 1789, and on the ratification debates, and far less time on subterranean connections between the Stuart monarchs and German legal theory.<sup>35</sup> His main interest, his intellectual center of gravity, is elsewhere.

I think I perceive, through a glass darkly, what Hamburger means by “unlawful.” I think -- although the ambiguities and obscurities of the tome make it irreducibly unclear - that the key to understanding Hamburger is that he isn’t an ordinary constitutional positivist. The main point, for him, isn’t that administrative law is inconsistent with this or that constitutional clause, or even the best overall interpretation of the Constitution. Hamburger is emphatic that “popular and scholarly debates” get off on the wrong foot by addressing the problem of administrative law “as if it were merely a flat legal question about compliance with the Constitution.”<sup>36</sup> Passages like this one abound: “[T]he legal critique of administrative law focuses on the flat question of unconstitutionality, and . . . this is not enough. Such an approach reduces administrative law to a question of law divorced from the underlying historical experience and thus separated from empirical evidence about the dangers [sic].”<sup>37</sup>

Hamburger has, in other words, an historically-grounded but entirely substantive and ironically extra-Constitutional vision of the true Anglo-American constitutional order, emphatically with a small-c.<sup>38</sup> That vision is rooted in the historical experience of the common-law judges who resisted (or didn’t -- I will explain the qualifier later) the prerogative despotism of the Stuarts. Hamburger’s deepest commitment is to this common-law version of Anglo-American constitutionalism. It is of secondary interest to

---

<sup>34</sup> Nor does Gary Lawson. See Lawson, *supra* note 32 (manuscript at 11) (expressing belief that Hamburger’s argument is not “reducible to strictly constitutional terms”).

<sup>35</sup> See also Lawson, *supra* note 32 (manuscript at 12) (“[Hamburger’s] point seems to be that there is something lawless about administrative governance that goes above and beyond inconsistency with the governmental scheme embodied by the federal Constitution.”).

<sup>36</sup> HAMBURGER, *supra* note 1, at 5.

<sup>37</sup> *Id.* at 15. See also *id.* at 493 (“The danger of prerogative or administrative power . . . arises not simply from its unconstitutionality, but more generally from its revival of absolute power.”).

<sup>38</sup> Lawson seems to agree. See Lawson, *supra* note 32 (manuscript at 12) (noting Hamburger uses “constitutionalism” to refer to “a very broad set of principles that are part of the Anglo-American legal and political tradition”).

him whether the written constitutional rules of the United States, as of 1789, correspond to that substantive vision.

Or rather he assumes that they do, quite casually. What makes the book blurry, and what makes my reconstruction tentative, is that the book typically elaborates an English constitutional principle at some length, and then offers a few brief pages and perhaps a few citations to connect up that principle with the American constitution and its original understanding.<sup>39</sup> So it is necessarily an exercise of judgment on my part to say that the English materials are where the book's heart lies, as it were. It would not be crazy, although I think it would be misleading, to see Hamburger as a conventional originalist who just goes very deeply into the English background, and who tends to assume, typically without much proof, that the English background transposes directly to the American case.

In the reconstruction I suggest, Hamburger offers a highly stylized constitutional vision derived from the English experience, interestingly cross-bred with American high-school civics -- and also premised on a desperately shaky understanding of administrative law, or so I will argue. In this vision, legislatures hold the exclusive power to "legislate," while judges exercise all "judicial" power, and exercise independent judgment in the sense that they decide all legal questions for themselves, without "deference." As for the executive, its only power is to "execute" the laws, understood very narrowly -- basically the power to bring prosecutions and other court proceedings to ask judges to enforce statutes. The thing to avoid at all costs is that the executive should issue "binding" orders or rules; where that occurs, the executive is necessarily exercising "legislative" power, and has arrogated to itself "extralegal" or "supralegal" prerogative, of the sort claimed by James II in his most extravagant moments.

When Hamburger says administrative law is "unlawful," this, I think, is the way to understand him. He means, in other words, that American administrative law is out of step with the deep substantive principles of the small-c constitutional order of the Anglo-American legal culture. Administrative law allows the executive to exercise "legislative" power by allowing agencies, and the President, to issue "binding" orders and rules, and

---

<sup>39</sup> Take, for example, Hamburger's discussion of deference. *Compare* HAMBURGER, *supra* note 1, at 285–91 (discussing English background), *with id.* at 291–92 (discussing the American Constitution and its immediate context).



in that sense allows the agencies a prerogative to act extra-legally or supra-legally, like the Court of Star Chamber. I will call this “the reconstructed thesis.”

## II. Administrative Law is Lawful

### A. Responses

Now, the reconstructed thesis could fail in one of several ways. One way would be that the thesis is simply wrong about what the deep principles of Anglo-American constitutional history actually are (assuming arguendo that such principles exist). I’m not qualified to judge whether the book offers a fair reading of English constitutional history, although I suspect that the story is far more nuanced than Hamburger lets on. On Adam Tomkins’ lucid account,<sup>40</sup> the common-law judges failed altogether in their resistance to royal prerogative.<sup>41</sup> When in 1638, nine of twelve judges allowed Charles I to levy ship-money taxes in peacetime, and without statutory authorization,<sup>42</sup> the game was essentially over. Royal pretensions were eventually curbed, but by civil war, Parliamentary resistance, and William III, not by common-law judges. Distilled to its essence, “the reality of the common-law constitution -- and the reason for its failure -- was that, as Coke himself explained it in the House of Commons in 1628, ‘in a doubtful thing, interpretation always goes for the king.’”<sup>43</sup> Chevron *avant la lettre*.

A second way the thesis might fail is that it might have no pragmatic implications whatsoever. It would be the easiest thing in the world to dismiss Hamburger’s book with the glib observation that it will change nothing. If one means by this that the administrative state will be essentially unchanged in its large institutional outlines for the foreseeable future, and that administrative law will also, the observation is certainly correct. Hamburger’s main proposal for rolling back the administrative state, step-by-step judicial correction,<sup>44</sup> verges on self-refutation. Weren’t the American judges who decided cases like Chevron the ones who helped get us into this mess in the first place, on Hamburger’s view? If they are a large part of the problem, why does he think they

---

<sup>40</sup> ADAM TOMKINS, OUR REPUBLICAN CONSTITUTION (2005).

<sup>41</sup> See *id.* at 69-87 (“The Failure of the Common Law Constitution”).

<sup>42</sup> See *id.* at 84-85.

<sup>43</sup> *Id.* at 87.

<sup>44</sup> HAMBURGER, *supra* note 1, at 491.

are also the source of the solution? Hamburger hasn't thought through the relationship between his diagnosis and his prescription, which are patently in tension with one another.<sup>45</sup>

Yet I don't think that the pragmatic dismissal is a fair response to Hamburger. That the administrative state is going nowhere does not mean that books like Hamburger's have no effect, or that they can be ignored on pragmatic grounds. The effect of such books, if accepted, is to quietly delegitimize the administrative state, to tear out its intellectual struts and props while leaving the building itself teetering in place -- a dangerous game.<sup>46</sup> The indirect and long-run effect of Hamburger's thesis on the intellectual culture of the legal profession, and perhaps even of the broader public, might be pernicious and worth opposing, even if there are no direct and short-run effects.

So I will not take either the route of disputing Hamburger's account of "lawfulness," or the route of dismissing his book as ineffectual. However, there is yet another, simpler way that the book's reconstructed thesis might go wrong. It might go wrong not in the major premise, about what the deep principles of the (putative) Anglo-American constitutional order are, but in the minor premise -- about whether American administrative law violates those principles, or at least whether Hamburger has shown that it violates those principles. That's the avenue I will follow. The book is lite on knowledge of administrative law, fatally so.

## B. Why Administrative Law is "Lawful" -- or Not Proven to be "Unlawful"

So let me accept Hamburger's premises, as I've tried to reconstruct them, and show that even given those premises administrative law is lawful. Or, at a minimum, I hope to show that the book hasn't come close to showing that administrative law is "unlawful," for the simple reason that it hasn't understood what administrative law says; the book veers off-target because it doesn't know where the target actually is. I'll sort

---

<sup>45</sup> See generally Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1788-90 (2013).

<sup>46</sup> See, e.g., HAMBURGER, *supra* note 1, at 509-511 (advocating for changes in legal and absolutist vocabulary under the title "candor").

the discussion into three main topics: delegation, the taxing power, and the separation of powers, including the separation of functions in agencies.

1. *Delegation* -- The delegation issue hangs over the whole book. Hamburger's basic charge, recall, is that administrative law rests on "prerogative" and is thus "extralegal." Whatever that means exactly, it would become a far more difficult claim to defend to the extent that administrative law enjoys valid statutory authorization. If administrative agencies exercise whatever powers they possess under the authority of valid statutory grants, then they act lawfully in the ordinary sense. Now of course agencies may go wrong in other ways -- for example, they may happen to exercise their delegated powers in an arbitrary and capricious manner -- but that is not a wholesale problem with the administrative state, and it's not the sort of wholesale critique of the administrative state's lawfulness that Hamburger wants to offer.

So Hamburger will have to deny that the statutory authorizations are indeed otherwise "lawful," in his special sense. He will have to say that even if the authorizing statutes are valid, in the ordinary legal sense, they violate the deep principles of Anglo-American constitutionalism. As we will see, he does say that -- on the basis of an argument that it is predicated on a straightforward mistake about American administrative law.

Let me start with a critical example of the delegation problem: Hamburger's treatment of Chevron.<sup>47</sup> In Chapter Four, the main point is that administrative "interpretation"<sup>48</sup> is a form of "extralegal lawmaking."<sup>49</sup> Hamburger contrasts two approaches, one in which judges decide what the law means in the course of deciding cases, and one -- putatively imperialistic, derived from Roman law -- in which the king or executive assumes a kind of "prerogative" or "extralegal" power to fill in gaps in the law. Hamburger's target here is Chevron deference to agency interpretations; he wants to draw an analogy between Chevron and the more luridly imperialistic pronouncements of James II and his servants about the king's gap-filling authority. "[B]ecause the office of

---

<sup>47</sup> *Chevron U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>48</sup> HAMBURGER, *supra* note 1, at 55.

<sup>49</sup> *Id.* at 57.

judgment belonged to the judges, the king could not interpret with judicial authority, and they could not defer to his views.”<sup>50</sup>

In Chapter Sixteen, his central treatment of “deference,” Hamburger makes the target explicit. I will quote some passages from his discussion, in part to give the reader a taste of the panoramic, conceptual, and largely question-begging flavor of Hamburger’s prose:

The most basic judicial deference is the deference to binding administrative rules. When James I attempted to impose legal duties through his proclamations, the [English common-law] judges held this void without showing any deference . . . . The English thereby rejected extralegal lawmaking, and in the next century the American people echoed the English constitutional response by placing all legislative power in Congress. Nonetheless, the courts nowadays defer to the executive’s extralegal lawmaking. . . . This deference to the executive is incompatible with the judicial duty to follow the law.<sup>51</sup>

But what if validly-enacted statutes themselves instruct the courts to defer? Legislative delegation of interpretive authority to agencies, if otherwise valid, would square the circle, reconciling the two approaches that Hamburger wants to contrast. If the law itself includes a valid delegation of law-interpreting authority to the agencies, then faithful judges, independently applying all relevant law in the case at hand, would conclude that the agency’s interpretive authority is not extra-legal, but securely intra-legal. This is of course the delegation theory of Chevron, now reigning as the official theory after its adoption by the Supreme Court more than a decade ago.<sup>52</sup>

---

<sup>50</sup> *Id.* at 54.

<sup>51</sup> *Id.* at 313–14.

<sup>52</sup> See *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (“We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”). For precursors, see, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000); *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740–41 (1997).

I hasten to add that I think that the delegation theory is an erroneous and insufficient justification for Chevron, both because it is rankly fictional<sup>53</sup> -- there just is no general delegation of that sort to administrative agencies -- and because the Chevron opinion itself is irreducibly ambiguous, or ambivalent, on the topic of delegation. At some points it endorses a version of the delegation theory.<sup>54</sup> At others it explicitly disavows that theory,<sup>55</sup> and instead rests deference on the benefits of political accountability and expertise.<sup>56</sup>

But the issue of the correct justification for Chevron is irrelevant for present purposes. All that matters here and now is that the official delegation theory is critical for Hamburger, because -- if correct -- it scrambles his categories. Indeed the very point of the delegation theory of Chevron is precisely to refute the charge that Chevron is lawless. The point of the theory, right or wrong, is to reconcile the traditional lawyer's conscience with deference to administrative agencies on questions of law.

All this is intended to illustrate the centrality of the delegation issue. What then does Hamburger say about delegation? How does he attempt to show that the authorizing statutes are themselves "unlawful"? With an argument, it turns out, that rests

---

<sup>53</sup> See Antonin Scalia, *Judicial Deference to Administrative Interpretation of Law*, 1989 DUKE L.J. 511, 517 ("In the vast majority of cases I expect that Congress . . . didn't think about the matter at all. If I am correct in that, then any rule adopted in this field represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate."); *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863, 1868 (2013) (per Scalia, J.) ("*Chevron* is rooted in a background presumption of congressional intent: namely, 'that Congress, when it left ambiguity in a statute' administered by an agency, 'understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'").

<sup>54</sup> See *Chevron*, 467 U.S. at 843-44 (statutory gaps rest on explicit or implicit delegations of law-interpreting power to agencies).

<sup>55</sup> See *Chevron* 467 U.S. at 865 (emphasis added):

Congress intended to accommodate both [environmental and economic] interests, but did not do so itself on the level of specificity presented by these cases. Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. *For judicial purposes, it matters not which of these things occurred.* Judges are not experts in the field, and are not part of either political branch of the Government.

<sup>56</sup> *Id.* at 865-66 (stressing the political accountability and expertise of administrative agencies in the executive branch). Thanks to Ron Levin for clarifying my thinking about the issues in this paragraph (although the views expressed here are mine alone).

on a simple misunderstanding of American administrative law. Hamburger's major charge is that administrative law permits "subdelegation" or "re-delegation" of legislative power from Congress to agencies.<sup>57</sup> With the exception of a few asides, to which I will return, Hamburger relentlessly, repetitively, urges that when the people have delegated legislative power to a certain body (Congress) in the Constitution, subdelegation or re-delegation of legislative power by that body to another is forbidden, under the old maxim *delegata potestas non potest delegari*.<sup>58</sup> The whole of Chapter Twenty<sup>59</sup> is devoted to elaborating this argument.

Unfortunately there is no one, or almost no one, on the other side of the argument. Administrative law is in near-complete agreement<sup>60</sup> with Hamburger on this point. The official theory in administrative law is precisely the one Hamburger thinks he is offering as a critique of administrative law: namely that Congress is constitutionally barred from subdelegating or re-delegating legislative power to agencies. Very oddly, Hamburger never cites the main-line of delegation cases that say exactly this, including most centrally Loving v. United States,<sup>61</sup> which doesn't appear in Hamburger's index.<sup>62</sup> Loving is explicit about all this: the official theory is that "the lawmaking function belongs to Congress and may not be conveyed to another branch or entity."<sup>63</sup> More recently, in City of Arlington v. FCC, the Court emphatically reaffirmed that legislative power is "vested exclusively in Congress."<sup>64</sup> Hamburger's elaborate proof that subdelegation of legislative power is forbidden amounts to pounding on an open door.

The difference between Hamburger and the official theory is that administrative law denies that there is any delegation of legislative power at all, so long as the

<sup>57</sup> See, e.g., HAMBURGER, *supra* note 1, at 377.

<sup>58</sup> *Id.* at 386.

<sup>59</sup> *Id.* at 377–402.

<sup>60</sup> I said that administrative law is in near-complete agreement about the official theory of delegation. The qualifier is necessary only because of a few judges here and there, most notably Justice Stevens, who have advanced a different, nonstandard theory: that some delegations of "legislative" power are valid, while some are not (with the "intelligible principle" test sorting between the two). See, e.g., Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 488–90 (2001) (Stevens, J., concurring). But this has never been the mainstream of American legal theory, as Stevens himself very candidly showed, with a long string citation. See *id.* at 488 n.1. For a defense of the Stevens view, see Kathryn Watts, *Rulemaking as Legislating*, Geo L.J. (forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2433742](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2433742)

<sup>61</sup> Loving v. United States, 517 U.S. 748 (1996).

<sup>62</sup> HAMBURGER, *supra* note 1, at 626.

<sup>63</sup> Loving, 517 U.S. at 758 (citation omitted) (citing U.S. CONST., art. I, § 1).

<sup>64</sup> City of Arlington v. FCC, 133 S. Ct. 1863, 1873 n.4 (2013).

legislature has supplied an “intelligible principle”<sup>65</sup> to guide the exercise of delegated discretion. Where there is such a principle, the delegatee is exercising executive power, not legislative power. As the Court put it in City of Arlington,

[a]gencies make rules (“Private cattle may be grazed on public lands X, Y, and Z subject to certain conditions”) and conduct adjudications (“This rancher’s grazing permit is revoked for violation of the conditions”) and have done so since the beginning of the Republic. These activities take “legislative” and “judicial” forms, but they are exercises of — indeed, under our constitutional structure they *must be* exercises of — the “executive Power.”<sup>66</sup>

One might think this distinction merely semantic. Nothing could be farther from the truth. The distinction results from a serious, substantive view of the nature of executive power, a view worked out in a line of cases beginning, at the latest, with Field v. Clark<sup>67</sup> in 1892,<sup>68</sup> and continuing with Grimaud v. United States<sup>69</sup> in 1911 and J.W. Hampton v. United States in 1928.<sup>70</sup> On that view, the whole problem of delegation is to navigate between Scylla and Charybdis.

On the one hand, if the only requirement were that the delegatee must act within the bounds of the statutory authorization -- the Youngstown constraint<sup>71</sup> -- the legislature could in effect delegate legislative power to the executive by means of an

---

<sup>65</sup> J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) (“If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.”).

<sup>66</sup> City of Arlington, 133 S. Ct. at 1873 n. 4.

<sup>67</sup> Field v. Clark, 143 U.S. 649 (1892).

<sup>68</sup> See *id.* at 692 (“That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution. The act [in question] is not inconsistent with that principle. It does not, in any real sense, invest the President with the power of legislation.”); *id.* at 694 (“The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government”) (internal quotation marks omitted) (citing Commonwealth ex rel. McClain v. Locke (Locke’s Appeal), 72 Pa. 491, 498–99 (1873)).

<sup>69</sup> United States v. Grimaud, 220 U.S. 506, 516 (1911) (holding that delegation to Secretary of Agriculture to manage public lands was not a delegation of legislative power but a conferring of “administrative functions”).

<sup>70</sup> See *supra* note 65.

<sup>71</sup> See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952) (the executive must derive authority to act either from an act of Congress or directly from the Constitution).

excessively broad or open-ended authorization. On this view, requiring the agency to act within the bounds of the statutory authorization is not enough. Youngstown must be supplemented by an additional standard -- in the rules-and-standards sense -- that courts use as a backstop, to police overly broad or vague statutory authorizations. Excessive breadth or vagueness means that the authorization in effect amounts to a delegation of legislative power de facto, even if not de jure.

On the other hand, the dilemma continues, it would itself be a misunderstanding of the constitutional scheme to require the legislature to fill in every detail necessary to carry its chosen policies into execution, and to adjust those details as circumstances change over time.<sup>72</sup> To require that would equally confound legislative power with executive power, just in the opposite direction. In order to prevent legislative abdication to the executive, it would in effect force the legislature to act as the executive itself. The “intelligible principle” doctrine steers between these perils, attempting to sort executive power to “fill in the details” from legislative power to set the overall direction for policy.

At this point critics of the administrative state, Hamburger very much included, tend to go wrong by assuming that the argument in favor of allowing the executive to fill in the details, and against requiring legislatures to handle all the details themselves, is all just an argument from practicality, or expediency, or necessity. It is not; it is emphatically an internal legal and constitutional argument, just as much as any of the arguments against delegation. The internal legal argument is that the power to fill in the details is an indispensable element of what “executive” power means; that to execute a law inevitably entails giving it additional specification, in the course of applying it to real problems and cases.

To be clear, the official theory of delegation in American administrative law is not a view that I agree with.<sup>73</sup> The better theory, and indeed the one with better founding-

---

<sup>72</sup> See, e.g., *Yakus v. United States*, 321 U.S. 414, 424 (1944):

The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations . . . . The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct . . . .

<sup>73</sup> See generally Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. Chi. L. Rev. 1721 (2002). There are a number of excellent response to and critiques of this paper, by Larry



era credentials,<sup>74</sup> is that so long as an agency acts within the boundaries of the statutory authorization, obeying the Youngstown constraint, the agency is necessarily exercising executive rather than legislative power, intelligible principle or no.<sup>75</sup> But right or wrong, the merits of that non-standard view are not relevant here, and the official theory of American administrative law is by no means trivially or obviously flawed. Before one discards it, one must first understand and respond to it. Hamburger's main, exhaustive argument about delegation simply fails to come to grips with the official theory.

So Hamburger seems largely unaware of the true grounds of his central disagreement with American administrative law. The true issue in controversy is not whether legislative power can be delegated (all concerned agree that it can't); the issue is whether administrative issuance of "binding" commands, under statutory authority, always and necessarily counts as an exercise of "legislative" power. Hamburger would have to say that it does; the main line of American administrative law says that it doesn't, at least not necessarily. So long as agencies are guided by an "intelligible principle," they are exercising executive power, not legislative power, even when they issue binding commands.

In various unfocused remarks,<sup>76</sup> Hamburger seems to recognize the problem implicitly, and seems to say that officials exercise "legislative" power whenever, and just so long as, they issue "binding" commands.<sup>77</sup> This is the argument he needs, and it is woefully underdeveloped. And in any event, as the Supreme Court has always

---

Alexander and Sai Prakash, Gary Lawson, and others; the citations are collected in Hamburger's book, in the notes to Chapter 20.

<sup>74</sup> See Posner & Vermeule, *supra* note **Error! Bookmark not defined.**73, at 1732–40 (arguing that the nondelegation doctrine is unsupported by originalist evidence, including original understanding, early legislation and legislative history, and early judicial decisions).

<sup>75</sup> See Posner & Vermeule, *supra* note **Error! Bookmark not defined.**73, at 1725–26 (arguing that *any* rulemaking engaged in by the executive pursuant to congressional authorization is a simple case of executive power).

<sup>76</sup> See, e.g., Hamburger, *supra* note 1, at 378 ("The subdelegation problem thus arises primarily where Congress authorizes others to make legally binding rules, for this binding rulemaking, by its nature and by constitutional grant, is legislative.") (emphasis added). There are remarks of this sort scattered through the book.

<sup>77</sup> For simplicity's sake, I focus here on rulemaking commands issued by an agency acting as mini-legislature, as distinguished from adjudicative commands issued by an agency acting as mini-court. Hamburger considers the latter 'unlawful' also. That conclusion is susceptible to objections that are parallel to the arguments that I make in the text regarding agencies' exercises of 'legislative' power in rulemaking. (Thanks to Ron Levin for clarifying my thinking here, and for suggesting the formulation in this note).

recognized, the argument simply can't be correct. There are several ways to put the problem, which end up at the same place, and have the same cash value.

One way is in terms of the distinction between “interpretation” and “lawmaking.” Hamburger seems to concede, as anyone must, that agencies can interpret statutes in the course of their work; he just assumes that in the proper scheme of things, judges will review those interpretations without deference, setting them aside freely if they are incorrect, in the judges’ independent view. But as others have pointed out,<sup>78</sup> the line between “interpretation” and “lawmaking” is hardly self-evident. Are agencies confined to parroting the exact language of the statute, or can they add specification? Hamburger gives no account of how to distinguish the two.

Furthermore, such interpretations are themselves “binding” in one straightforward sense. Executive officials necessarily and inescapably issue “binding” interpretations, just so long as the statute they are charged with applying is binding. Every time a taxing authority or customs officer interprets a statute and applies it to a person or firm, the interpretation is “binding” in the sense that it provides law for the addressee unless and until overturned by a higher administrative tribunal, or by a judge. Metaphysically speaking, it is the underlying statute rather than the administrative interpretation that “binds”; but the interpretation will inevitably add specification to the statute, even if only by applying it to a new case. Speaking practically rather than metaphysically, the agency interpretation is binding in the sense that it determines the legal position for the time being.

Finally, the Supreme Court has never -- not once, not in 1935, not ever -- accepted Hamburger’s position that every “binding” rule made by an administrative agency necessarily represents an exercise of “legislative” power. The Court specifically denied this in Grimaud, in 1911, and described administrative rulemaking power as a longstanding principle of American constitutionalism. It is worth quoting the key passages:

---

<sup>78</sup> See, e.g., Lawson, *supra* note 32 (manuscript at 28–30) (discussing the difficulties of distinguishing cleanly between lawmaking and interpretation).

From the beginning of the Government various acts have been passed conferring upon executive officers power to make rules and regulations—not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions "power to fill up the details" by the establishment of administrative rules and regulations . . . . That "Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." But the authority to make administrative rules is not a delegation of legislative power . . . .<sup>79</sup>

The point of Grimaud, the theory it embodies, is not to be waved aside. The theory is that it is an indispensably executive task to "fill in the details" of statutes with binding regulations. That sort of regulation does not compete with legislative power, or displace it, but complements and completes<sup>80</sup> it -- fulfilling, not compromising, the system of separated powers. Moreover, Grimaud claims that the theory has been adopted in American constitutional law from the beginning, as evidenced by unbroken legislative and executive practice. It just is part and parcel of the American system of separated powers, whatever Chief Justice Coke might have said about it.

Hamburger may disagree with that theory, or with the historical claim, but shouldn't he address them squarely? It isn't enough to just repeat, and repeat, the claim specifically disputed and denied in Grimaud and other leading cases -- the claim that "[w]hen Congress authorizes administrative lawmaking, it shifts legislative power to the executive."<sup>81</sup> The whole question, again, is whether authorized administrative rulemaking amounts to "lawmaking" or "legislative power." In a note,<sup>82</sup> Hamburger says

---

<sup>79</sup> *United States v. Grimaud*, 220 U.S. 506, 517, 521 (1911) (emphasis added) (quoting *Field v. Clark*, 143 U.S. 649, 692 (1892)).

<sup>80</sup> See generally Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280 (2006) (discussing the President's authority to "prescribe incidental details needed to carry into execution a legislative scheme, even in the absence of any congressional authorization to complete that scheme," *id.* at 2280).

<sup>81</sup> HAMBURGER, *supra* note 1, at 428.

<sup>82</sup> *Id.* at 596 n.3.

that Grimaud should be read narrowly, as a case about regulation on public lands.<sup>83</sup> Of course the rationale of the decision is not so confined, but that's not even the point. Where is the positive evidence, in American legal sources, for the view that Hamburger wants to describe as a deep constitutional principle -- the view that any and all "binding" administrative regulations promulgated under statutory authority count as forbidden exercises of legislative power? There is none.

2. *Delegation and the Taxing Power* -- The same basic problem cripples the book's treatment of delegation and the taxing power. Hamburger's discussion illustrates the sheer strangeness of the book's analysis, its remoteness from American constitutional and administrative law. Hamburger acknowledges that "[n]owadays, the question about extralegal taxation is not whether there is a prerogative or administrative power to tax without statutory authorization, but rather whether the executive can tax with such authorization."<sup>84</sup> But he insists that "in placing the power to tax in the legislature, constitutional law barred it from relinquishing this power."<sup>85</sup> By "constitutional law," here, Hamburger seems to mean constitutional law in his own sense, the small-c constitutionalism propounded by English common-law judges of the 17th century.<sup>86</sup>

The same mistake appears here as in the delegation discussion more generally: the theory of administrative law isn't that Congress delegates its legislative power to tax to the executive; the theory is that there has been no such delegation of legislative power at all, so long as an intelligible principle exists. But Hamburger clearly appears to think that there is some special problem about statutory authorizations of the power to impose taxes. The United States Supreme Court, however, addressed this very question in 1989, in Skinner v. Mid-America Pipeline Co.<sup>87</sup> Rejecting a claim that statutory authorization of the taxing power is subject to special, heightened scrutiny,

---

<sup>83</sup> *Id.* ("[T]he Court [in *United States v. Grimaud*] was speaking about the rules governing the use of public property, and whether it meant more than this [is] far from clear.").

<sup>84</sup> *Id.* at 62.

<sup>85</sup> *Id.*

<sup>86</sup> See *id.* at 63 ("To repeat the words of Chief Justice Holt, taxes were legislative, and therefore under 'the original frame and constitution of the government,' they 'must be by an act made by the whole legislative authority.'") (quoting *Brewster v. Kidgell*, (1698) 90 Eng. Rep. 1270 (K.B.) 1270; Holt, K.B., 670).

<sup>87</sup> *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212 (1988).

Skinner examined the text and structure of Article I, and the history of legislation from “[Congress]’ earliest days to the present,”<sup>88</sup> and found no reason to treat taxation differently.<sup>89</sup>

Skinner doesn’t appear in Hamburger’s index; one searches the book in vain for any trace of it (although I cannot swear it is not lying around somewhere in the vast expanse of the book). Hamburger seems to think he can discuss American administrative law without reading the cases. But knowing what Chief Justice Holt said in 1698 doesn’t necessarily entitle one to pronounce on the administrative law of the United States. The system of American administrative law is complex, and there is much to be read, and considered, and discussed, by anyone who would venture large-scale opinions about it.

3. *The Separation of Powers, and of Functions* -- Hamburger sees the main virtue of the separation of powers as institutional specialization of functions, which in turn limits arbitrary decisionmaking. The separation of powers underlying the Anglo-American constitutional order “forc[es] the government to work through specialized institutions with specialized powers . . . forcing it to work in a sequence of legislative, executive and judicial power.”<sup>90</sup> (Here Hamburger echoes a recent wholesale critique of the administrative state by Jeremy Waldron, who also emphasizes the importance of sequencing.<sup>91</sup>) The administrative state blatantly violates this principle. “Rather than follow the Constitution’s orderly stages of decisionmaking, an agency can blend these specialized elements together -- as when it legislates through formal adjudication [sic], or secures compliance with its adjudicatory demands by threatening severe inspections or regulation.”<sup>92</sup>

---

<sup>88</sup> *Id.* at 221.

<sup>89</sup> See *id.* at 222 (“We find no support, then, for Mid-America’s contention that the text of the Constitution or the practices of Congress require the application of a different and stricter nondelegation doctrine in cases where Congress delegates discretionary authority to the Executive under its taxing power.”).

<sup>90</sup> HAMBURGER, *supra* note 1, at 334.

<sup>91</sup> Jeremy Waldron, *Separation of Powers in Thought and Practice?*, 54 B.C. L. REV. 433, 441 (2013) (describing how the separation of powers may be conceived of as giving the legislature an “initiating place on the assembly line”). See also *id.* at 456 (describing the tripartite division of powers as “phases” in a “process”). For a critique of this view, see Adrian Vermeule, *Optimal Abuse of Power*, NW. U. L. REV. (forthcoming) (manuscript at 18–23).

<sup>92</sup> Hamburger, *supra* note 1, at 334.

There are at least two independently fatal problems with this treatment. One is the delegation problem, in a different form. The problem is that the institutionally-specialized process of lawmaking that Hamburger likes, with its sequence of legislative, executive and judicial action, is itself the source of the combined functions that Hamburger abhors.<sup>93</sup> Agencies exercise combined functions when, and only when, an institutionally specialized decision, an exercise of lawmaking through sequenced and separated powers, has concluded that they should, and enacted a statute to that effect. The following sequence has occurred many times: Congress enacts, the President approves, and the Court sustains against constitutional challenge a statute that delegates sweeping powers to agencies and allows combination of functions -- with important limitations and qualifications I will come to in a moment. Where on earth does Hamburger think combined agency functions come from? The combination of functions in agencies results from the operation of the system of separated legislative, executive and judicial powers. Does Hamburger think agencies have awarded such powers to themselves, on the basis of some sort of “prerogative”?

The second problem is that administrative law does not actually allow “agencies” to exercise “combined powers.” Hamburger’s repeated implicit claim to that effect is the sort of claim that is partly right, partly wrong, and entirely simplistic. What administrative law does is to sometimes, in certain ways and through certain carefully specified procedures, allows agencies to exercise combined powers. But from reading this book, one would never guess that administrative law spends as much time limiting the combination of functions as enabling it.

The scheme of the Administrative Procedure Act is complex and reticulated. Very roughly, it requires strict separation of adjudicative functions from prosecutorial and investigative ones, in formal on-the-record adjudication before an administrative law judge<sup>94</sup> -- but not in rulemaking, and not at the top level of the agency. There are separate rules against *ex parte* contacts in formal adjudication; those rules do apply at

---

<sup>93</sup> See Vermeule, *Optimal Abuse of Power*, *supra* note 91 (manuscript at 21).

<sup>94</sup> Hamburger’s treatment of administrative law judges, HAMBURGER, *supra* note 1, at 337–39, accuses them of pervasive institutional bias – principally on the basis of a discussion of Montesquieu (!) and citations to works from 1903, 1914, and 1927. (He does briefly cite a 2011 textbook as well). All these were written well before the enactment of the APA in 1946, and are thus more or less irrelevant to the incentives and possible biases of the modern administrative law judge. The vast literature on the (putative) biases of administrative law judges is nowhere to be found.

the top level of the agency. And at any level, due process remains a fallback constraint that allows courts to police prejudgment of adjudicative facts, conflicts of interest, or other forms of bias. The overall scheme, as Justice Jackson observed in Wong Yang Sung v. McGrath,<sup>95</sup> represents a hard-fought compromise.<sup>96</sup> The APA's approach to combination of functions recognizes and trades off both the common-law vision that animates Hamburger and also the value of competing goods, such as the activity level of agencies, their expertise, and the benefits of a unitary policymaker.<sup>97</sup>

Presumably Hamburger thinks that all this trading-off is a covenant with hell -- that the decisions, judicial and legislative and executive, upholding the combination of functions as a constitutional matter represent a betrayal of the Anglo-American constitutional order. (Here too, of course, all three branches, exercising their separated and specialized powers, have cooperated in setting up the current scheme of partially combined functions. Is this a betrayal of the separation of powers, or instead its offspring and fulfillment?) On this view, both the organic statutes that combine functions, and even the APA to the extent that it allows and endorses combined functions, are unconstitutional, in a small-c sense and probably also a large-C sense.

Of course I think that isn't so. But anyone who does think so should at least consider and discuss -- shouldn't they? -- the arguments offered by the architects of the combination of functions, by the generations of politicians, officials, lawyers and law professors who constructed the system, by the cases that both uphold it and, in various ways, constrain it. Here too, however, one searches in vain for any evidence that Hamburger even knows what he is attacking. Where are Chenery II,<sup>98</sup> FTC v. Cement Institute,<sup>99</sup> Wong Yang Sung,<sup>100</sup> Marcello v. Bonds,<sup>101</sup> Withrow v. Larkin<sup>102</sup>? All of these offer arguments, some of great plausibility and sophistication, about the administrative

---

<sup>95</sup> Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).

<sup>96</sup> See *id.* at 39–40 (describing the tangled legislative history leading up to the APA). As Justice Jackson put it, “The Act . . . represents a long period of study and strife; it settles long-continued and hard-fought contentions and enacts a formula upon which opposing social and political forces have come to rest. It contains many compromises and generalities . . . .” *Id.* at 40.

<sup>97</sup> Vermeule, *Optimal Abuse of Power*, *supra* note 91.

<sup>98</sup> SEC v. Chenery Corp. (Chenery II), 332 U.S. 194 (1947).

<sup>99</sup> Fed. Trade Comm’n v. Cement Inst., 333 U.S. 683 (1948).

<sup>100</sup> Wong Yang Sung, 339 U.S.

<sup>101</sup> Marcello v. Bonds, 349 U.S. 302 (1955).

<sup>102</sup> Withrow v. Larkin, 421 U.S. 35 (1975).

combination of functions, its justification, scope and limits, both under the Constitution and under the Administrative Procedure Act. Bizarrely, none of these are to be found in the index to the book. It's as though one tried to launch a deep critique of American-style constitutional judicial review without happening to mention the line of cases stemming from Marbury v. Madison.

## Conclusion

One reaction to Hamburger's book might be that it is interestingly wrong, in an unbalanced sort of way. On that view, the book could be seen as offering a kind of constitutional fiction, an oddly skewed but engagingly dystopian vision of the administrative state<sup>103</sup> -- one that illuminates through its very errors and distortions, like a caricature, or the works of Philip K. Dick. The book might then be located in the stream of legalist-libertarian critique of the administrative state, the line running from Dicey, through Hewart and Pound and Hayek, to Richard Epstein. That work is nothing if not interesting, if only because it is so hagridden by anxiety about administrative law.

On further inspection, though, this book is merely disheartening. No, the Federal Trade Commission isn't much like the Star Chamber, after all. It's irresponsible to go about making or necessarily-implying such lurid comparisons, which tend to feed the tyrannophobia<sup>104</sup> that bubbles unhealthily around the margins of popular culture, and that surfaces in disturbing forms on extremist blogs, in the darker corners of the Internet.

It's especially irresponsible to go around saying that the administrative state is "unlawful," whatever that may mean, without understanding what administrative law says, and seemingly with little idea about what exactly is being attacked -- little idea about the intellectual architecture that underpins administrative law, and that many generations of the legal profession have labored to build up. Trying to tear down the intellectual props of the administrative state, without understanding exactly what one is tearing down or what the consequences of doing so would really be, is an act of

---

<sup>103</sup> As mentioned above, I owe this idea to Charles Fried, who offered it at the Columbia conference on the book manuscript.

<sup>104</sup> See *generally* Eric Posner & Adrian Vermeule, *Tyrannophobia*, in *COMPARATIVE CONSTITUTIONAL DESIGN* 317-349 (Tom Ginsburg ed. 2012).



practical interest but no theoretical interest, like a child wrecking a sculpture by Jeff Koons. Some admire Koons's work, some detest it, but the child isn't in a position to understand why it might be detestable, and the act is purely destructive, with no illuminating import. It's a sign of the times, a portent of the dimming of the legal mind, that this book is described in some quarters as "brilliant"<sup>105</sup> and "path-breaking."<sup>106</sup> It isn't; and the only sensible response to Hamburger's question, as far as I can see, is "no."

---

<sup>105</sup> Lawson, *supra* note 32 (manuscript at 2).

<sup>106</sup> *Id.* (manuscript at 1).